

J.Q.B. asks the Appeals Board of the Utah Labor Commission to review Administrative Law Judge La Jeunesse's denial of Mr. B.'s claim for benefits under the Utah Workers' Compensation Act ("the Act"; Title 34A, Chapter 2, Utah Code Annotated).

The Appeals Board exercises jurisdiction over this motion for review pursuant to Utah Code Annotated §63-46b-12 and §34A-2-801(3).

BACKGROUND AND ISSUE PRESENTED

Mr. B. injured his back on November 20, 2003, while undergoing testing for possible employment with Knight Transportation. On January 12, 2004, Mr. B. filed a workers' compensation claim against Knight for his injury. Judge La Jeunesse held an evidentiary hearing on the claim on October 12, 2004, and then on March 21, 2005, issued his decision denying the claim. Judge La Jeunesse concluded that, because Mr. B. was not employed by Knight at the time of his injury, the injury is not compensable under Utah's workers' compensation system.

In requesting review of Judge La Jeunesse's decision, Mr. B. argues that the Utah Workers' Compensation Act should be construed to provide benefits for injuries that occur during pre-employment testing.

FINDINGS OF FACT

The facts surrounding Mr. B.'s claim are not in dispute. Mr. B. first contacted Knight for employment as a truck driver on approximately November 10, 2003. As part of its hiring process, Knight required applicants to participate in a three-day screening process that included orientation, medical examinations, drug testing and physical capacity testing. Originally, Mr. B. was to participate in this screening process beginning on Tuesday, November 11, 2003. However, due to a death in his family, Mr. B. informed Knight that he would begin the screening process the following week.

On Tuesday, November 18, 2003, Mr. B. and several other applicants began Knight's screening program. During the first two days, Mr. B. completed the orientation, medical examination and drug testing portions of the program. On Thursday, November 20, 2003, he was scheduled for physical capacity testing.

Knight did not conduct the physical capacity testing itself, but instead, contracted with "STEPS," an independent clinic, for that purpose. Mr. B. and two other applicants were driven by Knight to the STEPS facility, where they were put through a series of activities intended to replicate the physical activity required of truck drivers. Mr. B. completed several of these activities and was then instructed to perform a test of his lifting ability. Specifically, Mr. B. was required to lift and then set down a basket containing weights that were gradually increased to 100 pounds. Mr. B. injured his back while lifting and setting down the 100-pound weight. He reported the injury and was examined by a STEPS physician. The physician told Mr. B. he had probably strained his back. Mr. B. was told to return to the clinic the next morning to complete his physical capacity testing.

The next day, Mr. B. reported to Knight's business office rather than the STEPS clinic. At first, he was given various employment documents to sign, but then Knight's staff took the documents away and advised Mr. B. that he could not complete the documents until he had completed his testing.

There was no further contact between Mr. B. and Knight. Mr. Knight was never paid for the time he had spent participating in Knight's orientation program, nor did Mr. B. request payment. However, the applicants actually hired by Knight were paid for the orientation program.

DISCUSSION AND CONCLUSIONS OF LAW

Section 34A-2-401(1) of the Utah Workers' Compensation Act requires employers to provide workers' compensation benefits to "[a]n **employee described in Section 34A-2-104** who is injured . . . by accident arising out of and in the course of the employee's employment." (Emphasis added.) In turn, §34A-2-104 of the Act defines "employee" as "each person in the service of any employer . . . under any contract of hire . . . express or implied, . . . oral or written."

The Utah Supreme Court has previously addressed the meaning of "employee" for workers' compensation purposes. In *Oberhansly v. Travelers*, 295 P.2d 1093, 1095 (Utah 1956), the Court held "the term employee indicates a person hired to work for wages as the employer may direct." (Citation omitted.) Later, in *Board of Education of Alpine School District v. Olsen*, 684 P.2d 48, 51 (Utah 1984), the Court observed that "[t]his Court has articulated several factors to be considered in establishing whether an employment relationship exists. . . . An employee is hired and paid a salary or wage, works under the direction of the employer, and is subject to the employer's control." (Citations omitted.)

Thus, under the definition of employee found in §34A-2-104, as well as precedent from the Utah Supreme Court, an individual's ability to collect workers' compensation benefits depends upon the individual's status as an "employee," which in turn requires some type of contract of hire.

Mr. B. does not argue that he and Knight entered into any "express" employment contract. In fact, during the proceedings before Judge La Jeunesse, Mr. B.'s attorney explicitly stated that Mr. B. did **not** claim to be Knight's employee at the time of his injury. This statement is supported by Mr. B.'s testimony that Knight would not consider him for employment **until** he had demonstrated the physical capability to perform the duties required by the employment. The evidentiary record indicates that Mr. B. never completed Knight's screening process. Furthermore, Knight did not pay Mr. B. for his time, and Mr. B. took no action to compel payment. The Appeals Board therefore accepts Mr. B.'s assertion that he was not Knight's employee at the time of injury.

Despite this lack of an employment relationship, Mr. B. argues that the Utah Workers' Compensation Act should nevertheless be construed to provide coverage under the circumstances of Mr. B.'s claim. In support of this argument, Mr. B. refers to *Larson's Workers' Compensation Law* and appellate decisions from other jurisdictions.

While some jurisdictions have awarded benefits under circumstances similar to Mr. B.'s, other jurisdictions have not. There is no prevailing rationale or direction among these other

jurisdictions. But when the Appeals Board considers the specific requirement in Utah's Workers' Compensation Act of some form of employment contract, and the prior decisions of the Utah Supreme Court likewise requiring the existence of an employment contract, the Appeals Board concludes that the lack of such a contract in this case prevents Mr. B. from qualifying as an "employee" for purposes of receiving workers' compensation benefits.

ORDER

The Appeals Board affirms Judge La Jeunesse's decision and denies Mr. B.'s motion for review. It is so ordered.

Dated this 31st day of March, 2006.

Colleen S. Colton, Chair

Patricia S. Drawe

CONCURRING OPINION

I concur with the result. I agree absolutely with the majority's conclusion that, in order for a claimant to receive worker's compensation benefits, an employment relationship must exist between the claimant and the respondent business. Whether or not an employment relation exists is a mixture of facts and law. Based upon all the facts in this case – except for a critical admission by Mr. B. at his hearing – I would have found, as a matter of law that an employment relationship existed between B. and Knight Transportation at the time of the accident. However, at the hearing, Mr. B.'s counsel, twice, stated that B. did no claim that any employment relationship existed with Knight Transportation. Since a relevant fact as to whether or not an employment relationship exists is the intent of the parties, I must reluctantly accept Mr. B.'s representation and conclude that he is not entitled to worker's compensation benefits.

Joseph E. Hatch